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Who is the 'real' mother? Replacement and the politics of surrogacy[1]

'There is something so shocking in a child's being taken away from his parents and natural home! […] To give up one's child! I really never could think well of anybody who proposed such a thing' (Austen 1966: 68). Jane Austen's character Isabella Knightley, quoted here, highlights both differences and similarities between the eighteenth century and our present ways of imagining filiation. At the time, it was possible to have more than two parents, and those with money and influence could have this recognised in law. Witness Jane's brother Edward.[2] Edward was adopted as their heir by Thomas and Catherine Knight in 1783, when he was sixteen. Edward's parents were 'on the fringes of the gentry' (Fergus: 5) and, in a world keen to preserve estates and names, heirs were often imported via adoption. In fact, until the mid-nineteenth century adoptions were mostly undertaken to establish heirs and most of those adopted would already have achieved adulthood (United Nations 2009: 11). Austen's text registers that in the late eighteenth century this was beginning to give way to a sentimental and protective attitude to children:[3] Jane was initially horrified that Edward had to take the Knight family name as a condition of his inheritance of the Godmersham Park Estate (see Honan 1987), but such arrangements were a regular occurrence in a world that still had a functioning aristocracy.

Edward Austen's adoption was effected just the other side of a *Sattelzeit* that divides his world from ours.[4] The late eighteenth century was a time of flux. This was especially so with respect to ideas of filiation. Ludmilla Jordanova points out that in the eighteenth century reproduction was in transition, and that 'the middling sort' were active in 'constructing naturalised categories through which social relations could be imagined and managed' (371). It was then that children, previously '"naturally"' associated with their fathers, came to be associated with their mothers (373). In the late twentieth and early twenty-first century kinship is being reconfigured again, with particular implications for the role of mothers.

While people may no longer expect to inherit social standing from their families, 'hereditability of personal attributes has been amplified within the past century' (Finkler: 44). This is a period that has been termed 'the century of the gene' (see Fox Keller 2002). Foucault highlights the late eighteenth century as exactly the moment when the aristocracy's '*symbolics of blood*' gave way to the bourgeoisie's '*analytics of sexuality*' (1979: 147, emphasis in text). In fact we might say that a key difference between the eighteenth century and ours is that, whereas the former operated through a symbolics of blood, the late twentieth and early twenty-first centuries have seen the emergence of the analytics of the gene. In this, as we will see, 'blood' is still regularly deployed as a metaphor, though one with unstable meanings.

Periods of instability can produce new levels of self-consciousness, but they can also lead to intense pressures to naturalise key concepts and practices. This is perhaps particularly so with respect to reproduction and filiation since the ways we imagine and act on these are regarded as central to social and political order. Kinship has come to be understood as a set of biogenetic ties, and this combined with developments in new reproductive technologies [NRTs] means that, notwithstanding the principle *mater semper certa est* [the mother is always certain], the identity of a child's mother is no longer obvious (fatherhood has always been uncertain, as expressed in the principles *pater semper incertus est* [the father is always uncertain] and *pater est quem nuptiae demonstrant* [the father is he whom the marriage points out]). But the idea that the 'gestational carrier' is not the 'real' mother expresses a particular, biomedical and genetically inflected view of personhood. It is to the problem of motherhood and replacement that this essay is addressed. In particular, the purpose of this paper is to trace the replacement, displacement, and possible multiplication of mothers in the contemporary politics of surrogacy. I seek to plot the shape of some of the new changes, the role of law in them, and the to-and-fro between new developments and moments when the ghosts of old metaphors are made, often uncomfortably, to do new work.

The OED defines a surrogate as 'a person or thing taking the place of another; a substitute'. The word surrogate entered English from Latin in the seventeenth century, where it was used to denote those deputising for another, especially for a judge or bishop.[5] Since the 1970s the term has been applied to 'a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner or from the implantation in her womb of a fertilised egg from the other woman' (Oxford English Dictionary).[6] While the practice is old, going back at least to the Book of Genesis in the Hebrew Bible in the form of the slave Hagar carrying the child Ishmael for Abraham and Sarah, it has become an issue of intense concern of late, as a result both of technological developments and of the growth of markets in reproductive services.

One way to understand the character of the replacement that occurs in reproductive practices involving surrogacy is to look at its legal regulation.[7] In the UK, this currently occurs under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 1990 [hereafter HFEA 1990], as amended by the Human Fertilisation and Embryology Act 2008 [hereafter HFEA 2008]. This regulatory framework reflects entrenched ambivalence concerning surrogacy. The 1985 Act outlaws commercial surrogacy but allows altruistic surrogacy where no payment takes place, or where only 'reasonable expenses' are paid.[8] In the UK private surrogacy agreements are legal but not binding; section 26 of the HFEA 1990 specifies that 'no surrogacy arrangement is enforceable by or against any of the persons making it'. Section 27(1) of the 1990 Act (s. 33(1) of the HFEA 2008) provides that the 'woman who is carrying or has carried a child as a result of the placing in her of an

embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'. Section 28 of the 1990 Act (s. 35 of the HFEA 2008) specifies that the surrogate's husband or, after April 2009, civil partner is to be treated as the father as long as he consented to the procedure. Where the surrogate mother is single, the commissioning father can be recognised as the legal father if he is named on the birth-certificate; however, in order to acquire legal parenthood and extinguish the parenthood status of the surrogate (and her husband or partner if she has one) the commissioning parents must apply to court for a parental order (s. 30 HFEA 1990, replaced by s. 54 of the HFEA 2008). This requires that at least one of the intended parents have a genetic link to the child. The 2008 Act, which came into force in 2010, removed the restriction of parental orders to married couples. Unmarried and same sex couples (but not single people) may now apply for this faster route to post-birth parenthood (previously those outside marriage seeking parenthood following a birth through surrogacy would have to apply to adopt the child). Notably, despite this element of liberalisation, the 2008 Act continues to assert that a child can have a maximum of two parents and requires at least one of them to prove a genetic connection to the child.

Therefore while the fragmentation of parenthood brought about by NRTs opens up the possibility of recognising multiple parents, the logic of law is to reduce this multiplicity. This reduction is directed towards the normative ideal of two parents, at least one of whom has a genetic connection to the child. Thus, notwithstanding the variety of ways in which people can be 'parents', legislation surrounding surrogacy (and NRTs in general) espouses a particularly genetic conception of the parent (see Johnson 2003: 93). As we shall see, this has some startling consequences for women's capacity to be recognised as parents of children born as the result of such agreements. We can examine this more closely by looking at how metaphors of 'blood' work to designate parental status in recent legal cases.

The concept of the 'blood-tie' is an interesting feature of both popular discourse and legal judgments concerning parent-child relationships, but conceptions of 'blood' have been reconfigured dramatically in the face of the science of genetics. The 'blood-tie' has long been legally and culturally important in symbolising filiation,[9] but blood offers an unstable metaphoricity. Slightly amending Foucault's discussion of the symbolics of blood, noted at the outset, what we see in recent legal reasoning concerning parenthood in contexts of surrogacy is the continuation of the metaphor of blood, but where the meanings attached to the word 'blood' have been transformed. Before DNA testing the understanding of filiation symbolised by the concept of the blood-tie was one that construed connections more in terms of the inheritance of property than physical and psychological attributes per se, though these were important too (see Finkler 2000, ch 4). In a world of genetics, 'blood' – an archaic word – is now regularly used as a synonym for shared genetic inheritance. Historically, the 'blood-tie' (or what we now know as shared genes) has been, and often still is, ignored by law in determining parenthood. So, for example, until 1840 an illegitimate child was *filius*

nullius [a son of nobody], a position that reflected the concern to uphold patrilineal descent regarding property (Smart 1987: 101, also Maclean 1994). Marriage, not blood, continues to confer paternity in the rebuttable presumption[10] that a man married to a woman is the father of her children; in other words, law/custom rather than biology creates the legal relationship between fathers and children. However, with the advent of DNA testing this presumption is now supplemented by claims resting on genetic parentage. For women, the situation is different. The principle *mater semper certa est* continues the assumption that the mother of a child is the woman who bore it. The advent of DNA tests and the possibility of egg donation have not interrupted this; in particular the HFEA 2008 explicitly rules out the possibility that a woman is to be recognised as a parent '*merely* because of egg donation' (HFEA 2008 s.47 – italics added). This produces marked differences in the legal implications of NRTs for men and for women, regarding the acquisition of parental status.

A woman with a genetic connection to a child but who has not given birth to it cannot gain legal recognition as a parent other than through a parental order or adoption. A man who has a genetic connection can be on the birth-certificate provided the surrogate is unmarried. Where once fatherhood was a socio-legal 'fact', it has become increasingly predicated on intent and genetic contribution. But for women the principle that the woman who gives birth to the child is its mother interrupts such a re-framing. They have no way to assert a genetic tie (other than through a male partner if they have one) since the principle *mater semper certa est* breaks this in a way that it does not for men. Therefore we can say that NRTs and their legal framings parcel out parenthood differently for men and for women, and more specifically male gametes are recognised as determining parenthood in law more easily than female ones.[11] In arguments in which genetics are increasingly made to be the measure of filiation, a woman's contributions are often occluded even when they are genetic.

The claim to legal authenticity in respect of parenthood is grounded in exclusion, so that some of those contributing to the coming into being of a child are legally effaced, replaced by a normatively prized two-person parenting unit. In this respect it is significant that the HFEA 2008, an Act of Parliament directly addressing the multiplications produced by NRTs, continues to hold that a child can have a maximum of two parents. Whilst this legislation broke with the requirement that this must be one man and one woman, recognising same-sex parents for the first time, it nonetheless held on to what McCandless and Sheldon (2010: 177), following Fineman (1995) describe as the 'sexual family' form (Fineman 1995: 143). This is the model of the two-parent sexual couple. McCandless and Sheldon trace in some detail how, during the passage of the HFE Act 2008, and in the face of widespread disagreement concerning the grounds on which parents should be recognised, 'acceptance of the fact that we can have two – and only two – "real" parents has proved a unifying article of faith' (2010: 190). Thus whilst it might look at first sight like a major departure, the extension of recognition of parenthood to female civil partners of women who give birth undertaken

by the 2008 Act in fact represents the attempted assimilation of civil partnerships to the idea(l) of marriage, it is not a radically new way of recognising parent-child ties (McCandless and Sheldon 2010: 189; see also Diduck 2007). A number of difficulties of language indicate some of the ways in which this legislation strains to encompass new forms of procreation and family formation.

One of the more interesting features of this new provision for the recognition of same-sex parents is the way in which it works via rebuttable presumption, for this legal formulation enables the ghost of old ideas of filiation to structure new family forms. To elaborate, under the terms of the HFEA 2008, where two women are in a registered civil partnership or marriage, the partner of the woman who gives birth will be recognised as the child's 'other parent' unless it can be shown that she did not consent to the treatment or artificial insemination (HFEA 2008 s. 42). This directly mirrors agreed fatherhood conditions under the Act (2008 s. 35), but it also strongly echoes the old common law presumption of paternity. However, in cases involving same sex parents it does so in the face of knowledge of a lack of genetic relationship (unless the other 'female parent' is also the egg donor though, as noted, egg donation in itself carries no rights of recognition); thus in this instance, rather than the attribution of parenthood status following from a presumption of paternity, as with heterosexual marriage, law prescribes a relation in the context of the known absence of any genetic tie. In the provisions of the HFEA 2008, therefore, we can see an attempt to re-imagine parental dimorphism in the face of multiplicity and same-sex relations. This is most clearly articulated in the strained language used to describe one mother plus one gender-neutral parent: motherhood remains grounded in gestation and so 'the price to pay for the reward of children becomes conformity to the nuclear family ideal' (Smart 1987: 100). The 'de-gendered "parent" is [still] opaque' (Diduck 2007: 5).

There is inherent substitutability in the 'surrogate's' role. This substitutability of the surrogate as a 'gestational carrier' continues a long line of thinking about reproduction in which the birth-mother is an arbitrary vessel (see Laqueur 1990) and stands in sharp contrast to the pressure toward the importance of those considered to be 'biological' (meaning genetic) and/or intended parents. While there may be no (legal) problem when the surrogate remains a 'substitute', i.e. hands over the baby after the birth, considerable problems open up when the woman who has carried the child changes her mind and decides she wishes to keep it. In such cases 'surrogate' mothers overstep the surrogate role and make a claim to being the 'real' mother, something they may fail to enforce even when they are also the genetic mother. Such was the case in *Re N*.[12] In this case, a woman had offered herself as a 'surrogate' but told the commissioning couple that she had lost the baby early in the pregnancy, whilst going on to give birth and keep the child as her own. When the case came before the courts the baby, known as N, was 18 months old, and was settled with the birth mother and her husband. The judge asserted the equivalence of the claim to parenthood of the birth mother and the commissioning father , on the basis of the 'blood-tie', and went on to judge the case on the basis of N's interests, which were deemed best served by residence with the commissioning couple.

Thus the 'blood-tie' was reduced by the Court to genetic contribution. This case was decided on the principle of 'best interests', but one cannot help thinking that the 'surrogate' effectively became a scapegoat: a woman who enters a surrogacy agreement deceptively, notwithstanding legislation providing that she is the legal mother of the child at the point of birth, oversteps the line and makes a claim to be the 'real' mother; for this she is punished (for a more detailed discussion see Ashenden 2013).

In recent discussions of surrogacy the 'biological' is regularly reduced to the 'genetic' (or the 'blood-tie' where this concept is used as a synonym for genetic tie), thus occluding from view other biological processes that are essential to reproduction. 'Blood' has been used to talk about inheritance and filiation since the middle of the thirteenth century, and to signify 'a person of one's family, race and kindred' since the late fourteenth century (Online Etymology Dictionary). But none of these uses refers to genetic contribution. They cannot, since the science of genetics did not exist before the twentieth century. So it is worth asking what 'gene talk' is for, and noting that the words we use shape 'landscapes of possibility' (Fox Keller 2000: 138, 139). The use of 'blood' as a synonym for genes lends the genetic claim authority. But it is a very strange synonym, for blood signifies that which is spilt, which 'swells, gushes, spurts' (Online Etymology Dictionary), but also that which pollutes (see Knight 1991).[13] From this perspective, conception in a test-tube looks bloodless, unlike the deeply embedded, embodied physicality of the placenta that feeds the foetus. It is interesting to note that, notwithstanding the attempt to pin the 'blood-tie' to genetics, in one recent case the judge used a different understanding of blood in his summing-up, emphasising that 'the mother's blood does not circulate within the body of the foetus while in the womb' .[14] In this case, the High Court of Ireland found in favour of the genetic mother's claim to be the 'true' mother, but it was overturned by the Supreme Court which refused to endorse recognition of the genetic mother as legal parent and argued that it was up to the National Parliament to enact legislation that might make this possible. In the absence of such legislation, the 'surrogate' or birth-mother remains the child's legal parent.

Arguably, the examples referred to in this essay make the case for recognising the multiplicity inherent in the idea of collaborative conception (see Wallbank 2002). Yet a child can have a maximum of two parents on its birth-certificate in the UK, notwithstanding the fact that many more people may have been involved in its coming into being. Personhood is always symbolically mediated, and biological facts and normative judgements interwoven. Could Ishmael, born today, be recognised as the son of Hagar, Abraham *and* Sarah? Or would Hagar and Ishmael still be cast out following the birth of Isaac?

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NOTES

[1] Thanks to Naomi Segal and James Brown for many insightful suggestions on earlier drafts of this paper.

[2] Thanks to James Brown for this suggestion.

[3] On the transformation of childhood since the eighteenth century see Zelizer 1985, Cunningham 2006.

[4] *Sattelzeit,* or 'saddle-time', is the term coined by Reinhart Koselleck to denote the period of conceptual flux dating from approximately 1750 to 1850, during which many modern constellations of meaning emerged. See Tribe 1985: x.

[5] Note that 'vicar' comes from *vicarius*, meaning a deputy or substitute, see www.etymonline.com.

[6] Sometimes this involves the woman acting as surrogate using her own eggs combined with artificial insemination, which is known as 'partial surrogacy'; sometimes the woman acts as a 'carrier' of the gametes of the commissioning couple and/or of gametes donated by third parties, often termed 'gestational surrogacy'.

[7] Of course, surrogacy arrangements can be, and often are, wholly informal. However, as we will see below, even those informal arrangements in which there is no conflict between the parties involved can produce problems, for example when the state refuses to recognise those who are parenting the child as the legal parents.

[8] Recently in the UK *post facto* judgments have licensed increasing sums paid as 'reasonable expenses'.

[9] This is so both for individuals and for populations; with respect to the latter the designation of citizenship on the basis of *ius sanguinis* is especially important.

[10] A 'rebuttable presumption' is an assumption of fact accepted by a court until disproved. It is otherwise called a disputable presumption.

[11] Though see recent discussions of chimerism, used as a term to describe single organisms composed of two distinct zygotes, which complicates the idea that DNA uniformly marks out personhood and filiation.

[12] *Re N* (A Child) [2008] FLR 177; *In the matter of N (A Child)* [2007] EWCA Civ 1053; see also *H v S* (Surrogacy Agreement) [2015] EWFC 36.

[13] Note the different valences attached to male and female blood: male blood is spilled in battle, but female blood, especially menstrual blood, is often regarded as dirty; see Knight, also Buckley and Gottlieb.

[14] *M. R & Anor v. An tArd Chlaraitheoir and Others* [2013] IEHC 91; M.R v. An tArd Chlaraitheoir [2014] IESC 60.